Supreme Court, U.S.
FILED
DEC 21 1986
JOSEPH F. SPANIOL, JR.
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No. 85-1129

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAUL E. JOHNSON, PETITIONER

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent, a public employer, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by promoting a female employee over petitioner, a more-qualified male employee, pursuant to an affirmative action plan.

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INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits, inter alia, gender discrimination in employment. The Attorney General is responsible for enforcement of Title VII where, as here, the employer is a government, governmental agency, or political subdivision. 42 U.S.C. 2000e-5(f)(1). This Court's resolution of the issues presented in this case could accordingly have a substantial effect on the Attorney General's enforcement responsibilities. The federal government, which is the nation's largest employer, is also subject to the requirements of Title VII in that capacity. 42 U.S.C. 2000e-16.

STATEMENT

1. Petitioner is a male who began working in 1967 for respondent Transportation Agency, Santa Clara County, California. Petitioner applied for a position as a road dispatcher, a promotion opportunity posted by respondent in 1979. He and the eight other applicants who filled out an application form were interviewed and scored by respondent's oral board. Petitioner scored a 75; another

applicant, Diane Joyce, scored 72.5 A second oral board was conducted for those applicants who passed the first, and this board unanimously recommended petitioner for the promotion. Pet. App. 10a-11a.

During the selection process, Joyce contacted the Women's Coordinator for Santa Clara County, who contacted respondent's Affirmative Action Coordinator, who recommended to respondent's director, James Graebner, that he promote Joyce (Pet. App. 11a-12a). Graebner did so. He testified that he viewed the applicants as "essentially equal in qualification" (*id.* at 3a), that he predicated his decision to promote Joyce on the fact that there had never been a female road dispatcher, and that he relied on the goals expressed in the agency affirmative action plan in reaching his decision (*id.* at 6a). Affirmative action plans, adopted voluntarily by the County and its Transportation Agency, set as a goal the employment of women at a rate consistent with the percentage they comprise of the county-wide work force (J.A. 38, 113, 133).

2. Petitioner complained to the EEOC, received a right-to-sue letter, and sued respondent under Title VII. The district court ruled in his favor. It stated first that it was "satisfied by a preponderance of the evidence that the gender of Joyce was *the determining factor* in her selection" (Pet. App. 4a (emphasis in original)).[1] Concluding, therefore, that there was a prima facie case of discrimination, the court turned to the remaining question, on which it stated respondent had "the burden of going forward with the evidence"—"whether the preferred treatment accorded Joyce on the basis of her gender is justified" by respondent's affirmative action plan (*ibid.*).

The court took as its starting point for this inquiry four standards derived from *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), upon which this Court predicated its approval of the plan there involved (Pet. App. 5a):

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[1] See also Pet. App. 12a-13a (findings of fact) (petitioner "was more qualified for the position of Road Dispatcher than Diane Joyce" (see also *id.* at 14a ¶ 3); "[b]ut for [petitioner's] sex, male, he would have been promoted to the position of Road Dispatcher"; and "[b]ut for Diane Joyce's sex, female, she would not have been appointed to the position of Road Dispatcher").

whether the plan was designed to break down old patterns of (in the present case) gender segregation and hierarchy; whether the interests of male employees were unnecessarily trammeled by requiring their discharge and replacement with female hirees; whether the plan created an absolute bar to the advancement of male employees; and whether the plan was a temporary measure, not intended to maintain a gender balance, but rather to eliminate a manifest gender imbalance (*id.* at 6a).

After reviewing the evidence, the court determined that respondent had failed to carry its burden of showing that the plan was intended to be temporary (Pet. App. 6a-8a).[2] The district court also found that respondent "has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular" (*id.* at 13a). The district court thus found that there had been no showing that the plans had been adopted to break down old patterns of segregation and hierarchy, but the court said expressly that it was not relying on this finding in ruling for petitioner (*id.* at 9a-10a). With regard to the remaining two *Weber* factors, the district court also found that respondent had "unnecessarily trammeled [petitioner's] interests" and had "creat[ed] an absolute bar to his promotion to the position of Road Dispatcher" (*id.* at 14a), but did not elaborate on these findings. The court concluded that petitioner was entitled to relief, and ordered that he be promoted and reimbursed for back pay.

3. The Ninth Circuit reversed (Pet. App. 17a-50a). It also considered *Weber* to be the key precedent, and determined that while "[t]he [Supreme] Court has yet to

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[2] See also Pet. App. 13a (findings of fact) ("The Affirmative Action Plan had no end date or other provision which would have the effect of ending preferential treatment to women" (citations to record omitted).); *id.* at 14a (conclusions of law) (the plan was "interpreted in such a fashion so as to attempt to maintain an ongoing balance"; respondent "failed to demonstrate that the * * * Plan * * * will end or be modified in any way at any point in time or when [respondent's] work force composition as a whole, by department, by EEOC category or [respondent's] major job classification reaches a certain number of percentage of women").

'define in detail the line of demarcation between permissible and impermissible affirmative actions plans,' * * * the Court noted several aspects of the *Weber* plan that placed it 'on the permissible side of the line' "—*i.e.*, the same four the district court had discussed in coming to the opposite conclusion: "[t]he plan (1) was designed to break down old patterns of racial segregation and hierarchy, (2) did not unnecessarily trammel the interests of white employees, (3) did not create an absolute bar to the advancement of white employees, and (4) was a temporary measure, 'not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance' " (*id.* at 22a (quoting *Weber*, 443 U.S. at 208)).

The court went through the listed factors, concluding, first, that just because the plan did not purport to be temporary did not mean that it was permanent, since the plan did not say on its face that it was permanent, and certain testimony to the contrary could be discounted if "[r]ead in context" (Pet. App. 23a-26a). Second, the court held that, in order to show that a plan was designed to break down old discriminatory patterns, it is not necessary for the employer to show its own history of purposeful discrimination, so long as it shows a "conspicuous imbalance in its work force" (*id.* at 26a)—asserting, in this regard, that "not one of [respondent's] 238 skilled craft [positions] was [held by] a woman" (*id.* at 27a).[3] The court also determined that just because petitioner did not get the promotion did not mean there was an absolute bar to his promotion: "The fact that [Joyce's] sex may have been the decisive factor in the selection of a woman * * * does not indicate that men will always be excluded" (*id.* at 29a). Thus, the court concluded that respondent's plan, like the *Weber* plan, fell on the permissible side of the line.

In dissent, Judge Wallace "conclude[d] that the record before us is insufficient to make broad pronouncements of judicial policy" (Pet. App. 32a). He said that he would remand the case because "the record suggests that the district court improperly allocated the burdens of persua-

[3] But see, *e.g.*, page 26 note 18, *infra*, for a discussion of what the record reveals concerning this "imbalance."

sion and production between the parties," and because "the court did not make sufficiently detailed findings on the plan to hold it invalid" (*ibid.*).

As to the burdens of persuasion and production, he concluded that affirmative action plans should be viewed as affirmative defenses; that the majority incorrectly concluded that respondent need only show " 'some evidence' " that the plan was in response to a conspicuous work force imbalance and was reasonably related to a remedial purpose, after which it was up to petitioner to show the plan to be invalid; and that, since it was unclear how the district court allocated the burdens of going forward and persuasion, the case should be remanded (Pet. App. 39a-40a).

On the validity of the plan, the dissent reviewed the same four *Weber* factors and concluded that the panel majority had failed to establish persuasively that any of them had been met. Setting forth his own view of how those factors should have been interpreted by the district court, Judge Wallace noted: (1) that with respect to whether the plan breaks down historic patterns of discrimination, "an employer cannot rely on statistics alone as a short-cut around the critical need for causal evaluation and analysis" (Pet. App. 43a); (2) that, with respect to whether the plan unnecessarily trammels the interests of non-minority employees, the record demonstrated no "serious evaluation" aimed at establishing the "reasonableness of the plan with respect to non-minority employees" (*id.* at 44a); (3) that there was similarly insufficient analysis of the extent to which the plan bars the advancement of non-minority employees (*id.* at 44a-45a); and (4) that the case should also be remanded to the district court for it to consider whether the plan is only temporary, since the majority read *Weber* too broadly in finding that it was (*id.* at 45a-46a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is the Court's first plenary consideration of a claim under Title VII of the Civil Rights Act by a male for gender discrimination in respect to promotion by a public employer, who was acting pursuant to an affirma-

tive action plan. It thus presents difficult issues, the answers to which can only be arrived at by extrapolation from the Court's past decisions.

In considering when discrimination by a public employer is authorized by Title VII, any constitutional limitations on such official discrimination carry over to Title VII, thus avoiding an interpretation of Title VII which would render it pro tanto unconstitutional.[4] To be sure, Title VII may be—and in its application to private employers clearly is—more restrictive of employer conduct than the Constitution. But insofar as it grants a cause of action to a class of employees, it should not be read as authorizing affirmative discrimination by an employer which would be forbidden by the Constitution. This interpretation should obtain whether or not a plaintiff also claims a violation of the Constitution as such.

As a starting point for analysis, we affirm that just as this Court has repeatedly stated that Title VII protects all individuals regardless of race from racial discrimination, lower court decisions, unquestioned administrative practice, and the text of the statute itself make clear that Title VII protects men as well as women from gender discrimination. The dilemma posed by this case, like that confronted by this Court most clearly first in *United Steelworkers* v. *Weber*, *supra*, and several times last Term, arises out of the use of an affirmative action plan

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[4] An initial difficulty may be put to one side: that the public employer's action complained of is gender, not race, conscious and thus in a constitutional setting would presumably not have to survive the strictest level of scrutiny. There is no reason to conclude that Congress in enacting Title VII intended employers to be freer to discriminate on grounds of gender than on grounds of race. Whatever the constitutional difference between the two forms of discrimination, for purposes of this statute they must meet the same level of justification if the employer is to escape liability (excepting only the narrowly confined "bfoq" defense, which applies to gender but not race discrimination). To be sure, the contents of the justifications an employer will offer may differ in the case of gender, but the level of scrutiny any such justification must meet will be the same. Accordingly, we draw on cases dealing with the two kinds of discrimination without distinction—a procedure which would be inappropriate were we dealing with age or handicap discrimination.

which is alleged to commit the employer to exactly the discrimination the statute's literal language forbids, but does so in order to favor a group whose disadvantage was surely a motivating force behind the statute.

One resolution of this dilemma would focus on this undoubted legislative motivation, permitting discrimination favoring the previously disfavored groups. This Court has firmly set its face against this resolution as early as *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), and repeatedly reaffirmed that position. The history of discrimination against some in this country was to be met by a prohibition in principle of discrimination against any race, and against males as well as females. At the same time, the Court has declined to follow this principle to the limit of its logic. In several cases last Term, a majority of the Court in a variety of formulations made clear that race conscious (and therefore, we submit, gender conscious) measures may sometimes be permissible other than as a strict measure of corrective justice—*i.e.*, persons may be favored because of their race (or gender), and not because they themselves have suffered discrimination. As we understand it, the middle course taken in those cases would permit, in appropriately limited circumstances, race (or gender) conscious measures benefiting persons identified solely by group membership who have not themselves suffered specific discrimination, but only as a remedy for past discrimination.

Although some Justices have indicated in dicta that the list of justifying grounds may not be limited to remedying past discrimination, the weight of authority in this Court, including last Term's decisions in *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), and *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986), is that the mere history of discrimination in the society or community is not such a justification. And we infer correspondingly that a mere desire to achieve some numerical proportion or balance of races or gender cannot serve as a justification for discrimination. Indeed, the conclusion follows *a fortiori*, since any asserted imbalance may have come about without any choice or discrimination on the part of the employer at any time.

The justifying basis for non-victim-specific, race or gender conscious affirmative action on which the Court focused last Term and the middle course it there took must, therefore, be taken to refer to the remedying of past discrimination by the particular employer, not society at large. This middle course looks back to and resolves a possible ambiguity in the *Weber* case. In that case, too, the Court emphasized the specifically remedial role of a non-victim-specific, race conscious affirmative action plan, but in language which left uncertain whether it was prior discrimination or imbalance itself that was being remedied. In retrospect it seems clear that the Court in *Weber* was seeking not to leave open the door to mere "societal discrimination" as a justifying ground. Rather, it was seeking to solve an altogether different problem: the hardships faced by an employer who wishes to remedy his own prior discrimination on the one hand, but does not on the other wish in effect to concede liability for such past discrimination as a condition for escaping liability for what would otherwise be unjustified reverse discrimination. In various formulations last Term, the Court addressed the issue, but nowhere gave reason to doubt that the employer must have firm, objective grounds suggesting that he has engaged in discrimination.

The instant case is concerned with an identified individual claiming a specific and justifiable expectation of advancement in a career to which he had devoted many years. It thus raises a set of considerations first dealt with in *Weber* and explicated more fully in *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984), and *Wygant*: though the Court will permit race-conscious (or gender-conscious) action to remedy past discrimination even if the action is not strictly corrective (*i.e.*, is not victim-specific), yet because such action is obviously in tension with a major premise of Title VII and the Equal Protection Clause—individuals not groups, and *all* individuals are protected against race or gender discrimination—such remedies must be narrowly tailored, and must trammel on the rights and expectations of innocent persons as little as possible. This conclusion requires consideration of two kinds of elements, the degree and focus of the harm to

those who are treated other than on their individual merits, and the availability of less burdensome alternatives. These elements require particular attention in this case. Because they did not receive this attention below, and indeed because in our view this record reveals not carefully tailored remedial action but a rather extreme example of casual social engineering heedless of individual rights, the decision of the court of appeals should not be allowed to stand.

ARGUMENT

RESPONDENT HAS FAILED TO JUSTIFY ITS DISCRIMINATION AGAINST PETITIONER BASED ON ITS USE OF AN AFFIRMATIVE ACTION PLAN

A. The Making Of Employment Decisions On The Basis Of Gender Is Presumptively Illegal Under Title VII, But Is Sometimes Permissible By Reference To A Number Of Factors Which This Court Has Found To Be Relevant

1. The overriding purpose of Title VII is to prohibit discrimination in employment on the basis of race, sex, or other criteria listed in the statute (42 U.S.C. 2000e-2(a)(1)). The Court has made clear that "Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual, or national class' " (*Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1083 (1983) (emphasis in original) (quoting *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978)). Title VII protects whites as well as blacks (*McDonald* v. *Santa Fe Trail Transportation Co.*, *supra*), and men as well as women (*Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 681 (1983). Certainly in the context of public employment, the protections of Title VII are at least coextensive with those afforded by strict scrutiny under the Equal Protection Clause, for gender as well as race.[5]

[5] As to all employers covered by Title VII, this Court's prior pronouncements on the constitutional permissibility of voluntary affirmative action programs by public employers are instructive with respect to Title VII's parallel bar of discrimination, since similar values and interests are at stake. Moreover, reliance on constitutional principles to the extent they are relevant to statutory

Like the constitutional right to equal protection, the Title VII protection against discrimination in employment

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reverse discrimination issues allows us to avoid unfortunate inconsistencies between a public employer's responsibilities under Title VII and the Constitution. Cf. *Wygant*, slip op. 7 (O'Connor, J., concurring).

With respect to public employers, presumably Congress did not intend to "authorize" unconstitutional behavior as a defense to a claim under Title VII or to provide less protection against discrimination under Title VII than is afforded under the Constitution. See, *e.g.*, *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500-501 (1979). As three members of this Court have put it (*Bushey* v. *New York State Civil Service Comm'n*, cert. denied, No. 84-336 (Jan. 7, 1985), slip op. 6 (Rehnquist, J., Burger, C. J., and White, J., dissenting from denial of certiorari)), it is doubtful that when Congress amended Title VII in 1972 to bring public agencies within its mandate it intended to allow those agencies to claim that their action is shielded under Title VII, even if the action may violate the Fourteenth Amendment. Indeed, the legislative history of the 1972 amendments demonstrates that Title VII was not intended to provide less protection against intentional discrimination than the Equal Protection Clause. See H.R. Rep. 92-238, 92d Cong., 1st Sess. 19 (1971), *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 78-79 (Comm. Print. 1972) (*Leg. Hist.*); see also S. Rep. 92-415, 92d Cong., 1st Sess. 10 (1971), *Leg. Hist.* 419. Cf. *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 286-287 (1978) (opinion of Powell, J.); *id.* at 329-339, 340 (opinion of Brennan, J., White, J., Marshall, J., and Blackmun, J.).

A question remains whether the discrimination at issue here should, solely because it is based on gender rather than race, be assessed under a less stringent standard of review. See *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). In our view, any such diminution of judicial scrutiny would be directly at odds with the purpose and language of Title VII. As this Court has noted, Congress decided in Title VII to extend the same protection from discrimination based on race to discrimination based on sex. See *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. at 709. Accordingly, relegating gender to "second-class citizenship" among the prohibited discriminatory criteria governed by Title VII would be contrary to congressional intent. We note that the immediate level of scrutiny for gender classifications had not been formulated or implemented by the Court when the 1972 amendments were enacted. Indeed, soon after the amendments were enacted, a plurality of this Court had suggested that the same strict scrutiny applies in the area of gender classifications as in the area of race. See *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

"cannot mean one thing when applied to one individual and something else when applied to a person of another color" (*Regents of the University of California* v. *Bakke*, 438 U.S. 265, 289-290 (1978) (opinion of Powell, J.)). See also *Wygant* v. *Jackson Board of Education*, *supra*. Nor does it matter if the discrimination's "purpose can be characterized as 'benign.'" *Bakke*, 438 U.S. at 294 (opinion of Powell, J.).

2. Where a court orders or an employer voluntarily gives a preference to a person against whom the employer has discriminated, this of course is wholly consistent with the principles stated above, since the victim's group characteristics are considered only insofar as is necessary to reverse the wrong done the victim by previously treating him as a member of that group and not as an individual. Victim specific, make whole relief is the natural and usual remedial corollary to the substantive "individual rights" principle of Title VII and the Equal Protection Clause. See, *e.g.*, *Ford Motor Co.* v. *EEOC*, 458 U.S. 219 (1982) (absent special circumstances, backpay period terminated by rejection of unconditional job offer accompanied by right to pursue court action for make whole relief); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) (retroactive seniority is available for victims of post-Act hiring discrimination); *Teamsters* v. *United States*, 431 U.S. 324 (1977) (constructive seniority available only for indentifiable victims). See also *Sheet Metal Workers*, slip op. 25-26, 32, 38, 40, 51 (stressing remedial context); *id.* at 2, 7 (Powell, J., concurring) (same); *id.* at 1 (White, J., dissenting) ("As the Court observes, the general policy under Title VII is to limit relief for racial discrimination in employment practices to actual victims of the discrimination.").

3. Over the years, employers and others, citing concern over the effects of past discrimination,[6] have adopted

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[6] Members of the Court have also recognized—as the constitutional strict scrutiny test allows—certain other occasions in which an employer may take into account group characteristics. Such justifications as recruiting undercover agents for work in a racially defined group or seeking diversity in an educational institution (see *Bakke*, 438 U.S. at 311-315 (opinion of Powell, J.);

race—or gender—conscious affirmative action plans, giving persons concrete advantages because they belong to groups which have or are being discriminated against although these individuals have themselves suffered no such discrimination. There is much, as we have pointed out, in the language and interpretation of Title VII that is in conflict with such an idea of affirmative discrimination along class lines. See *Stotts*, 467 U.S. at 579-583; *id.* at 587-588 (O'Connor, J., concurring); *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977); *Teamsters*, 431 U.S. at 367-376; *Milliken* v. *Bradley*, 418 U.S. 717, 738, 746 (1974); *Bakke*, 438 U.S. at 309 (opinion of Powell, J.); *Fullilove* v. *Klutznick*, 448 U.S. 448, 541 (1980) (Stevens, J., dissenting); see also *Ford Motor Co.*, 458 U.S. at 236-240.

The decision of this Court in *United Steelworkers* v. *Weber*, *supra*, established, however, that private race-conscious affirmative action plans may be permissible. And, in *Sheet Metal Workers*, the Court further held that race-conscious hiring goals may, at times, be ordered by a court as a necessary remedy for a recalcitrant defendant with an egregious and pervasive history of discrimination. The *Weber* Court did not define in detail the circumstances justifying such plans or "the line of demarcation between permissible and impermissible affirmative action plans" (443 U.S. at 208). Nor has any majority opinion of this Court ever set forth with precision any simple test or sweeping rule for determining under what circumstances class-based remedies are permissible.

Certain basic principles, however, may be discerned in this Court's opinions concerning the permissible legal and constitutional scope of affirmative action plans. The first principle is that, at least in the Title VII employment context, any race conscious affirmative measures, whether enacted voluntarily or pursuant to court order, must serve some remedial purpose. Further, all such action must be narrowly tailored to further this remedial goal with as

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Wygant, slip op. 3 (O'Connor, J., concurring); *id.* at 2-3 (Stevens, J., dissenting)) have not been suggested here and obviously have no application in this case.

little adverse effect as possible on innocent persons. We address these principles in turn.

B. Affirmative Action Must Be Remedial Of The Employer's Wrong

Weber justified affirmative action plans if they were "designed to break down old patterns of racial segregation and hierarchy" (443 U.S. at 208). This language was recognized at the time (see *id.* at 209 (Blackmun, J., concurring)), as pointing in two directions: that mere imbalances might justify such plans, or that such plans are permissible only if remedial. We believe several decisions last Term, as well as earlier decisions which the Court either cited or did not repudiate in *Weber*, resolve this ambiguity and permit the conclusion that race or gender conscious plans, which are not victim specific, must at least be remedial and remedial of the employer's past discrimination.

Principally we rely on the strong rejection of the notion that "societal discrimination" may justify such a plan. For if societal discrimination—*i.e.*, discrimination by others than the employer—cannot justify such a plan, then only the employer's own discrimination can serve as a predicate for remedial action. As the plurality wrote in *Wygant*, slip op. 6:

> This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.

See also *id.* at 9 (requiring "sufficient evidence to justify the conclusion that there has been prior discrimination"); *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 2 (O'Connor, J., concurring); *id.* at 1-2, 3, 4 (White, J., dissenting) ("an employer may adopt * * * racially discriminatory hiring or promotion practices * * * only as a remedy for its own prior discriminatory practices"); *Fullilove*, 448 U.S. at 490-492 (opinion of Burger, C.J.); *id.* at 498 (Powell, J., concurring); *Bakke*, 438 U.S. at 307-310 (opinion of Powell, J.); cf. *Bazemore* v. *Friday*, No. 85-93 (July 1, 1986), slip op. 1 (White, J., for the

Court); *Stotts*, 467 U.S. at 587-588 (O'Connor, J., concurring) ("a court may use its remedial powers * * * only to prevent future violations and to compensate identified victims of unlawful discrimination") (citations omitted).[7]

A fortiori, a mere desire to obtain some numerical racial or gender balance, as was found sufficient in the court below (Pet. App. 26a), must be wholly unacceptable for remedial race or gender conscious discrimination, since there is lacking the assertion even of generalized or societal discrimination, which may have limited employees' free choice of occupation. When the purpose is statistical balance we are in the domain of untrammeled social engineering. See *Sheet Metal Workers*, slip op. 31-36, 38, 50, 52 (plurality opinion); *Weber*, 443 U.S. at 208; cf. 42 U.S.C. 2000e-2(j).[8]

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[7] The impermissibility of utilizing societal discrimination as an affirmative action predicate appears, if anything, even more compelling in the Title VII context. As the *Weber* Court noted (443 U.S. at 202-203), it was precisely this tragic history of blatant societal discrimination against blacks and other minorities which served as the primary impetus behind Congress's decision to outlaw differential treatment of any employee on the basis of race or gender. Congress cannot be taken to have contemplated abandoning this nondiscrimination principle whenever an employer maintained that it was engaging in such discriminatory treatment in order to ameliorate the effects of societal discrimination. For given the clear presence of the effects of societal discrimination in 1964 (and today), this would mean that Congress intended to permit discrimination designed to benefit minorities and women in every instance and thus to render its ban on discrimination against "any individual" a nullity from its inception. No such conclusion can be squared with either *Santa Fe* or the statute's plain language.

[8] See also, *e.g.*, *Sheet Metal Workers*, slip op. 52 (plurality opinion) (upholding membership goal in part because it was "not being used simply to achieve and maintain racial balance, but rather as a benchmark" to measure efforts to remedy past discrimination); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 435 (1976) (in holding that the district court exceeded its authority by ordering annual readjustment of school attendance zones so that there would not be a majority of any minority in any given school, the Court emphasized that "[t]here was * * * no showing that those * * * changes in the racial mix * * * were in any manner caused by segregative actions chargeable to the [school officials]"); *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (suburban school districts not obligated to remedy Detroit's prior segregative practices).

Thus, a history of past discrimination, in which the employer has participated, is a minimum predicate that must be met before an innocent person's employment opportunities may be denied pursuant to a class-conscious affirmative action plan benefiting non-victims of discrimination. Unless such action seeks to correct prior discrimination by the employer, its purpose simply cannot be said to "mirror those of the statute" (*Weber*, 443 U.S. at 208). Further, the plurality opinion in *Sheet Metal Workers* strongly indicates that that is currently the rule governing relief ordered by a court in a Title VII action (slip op. 50).

The Court's decision in *Weber* addressing a voluntary affirmative action plan is at least consistent with this conclusion and, particularly when read in conjunction with *Santa Fe*, seems clearly to support it. In upholding the plan before it, the *Weber* Court emphasized first that the plan was "designed to break down old patterns of racial segregation and hierarchy" (443 U.S. at 208). It noted that "blacks had long been excluded from craft unions," and cited in a lengthy footnote "[j]udicial findings of exclusion from crafts on racial grounds * * * so numerous as to make such exclusion a proper subject for judicial notice" (*id.* at 198 & n.1). Because of this union discrimination, and because the employer hired for that plant only persons with prior craft experience, its own hiring practices excluded nearly all black applicants to be skilled craftworkers. As the Court pointed out, "prior to 1974 only 1.83% (5 out of 273) of the skilled craftworkers * * * were black, even though the work force in the * * * area was approximately 39% black" (443 U.S. at 198-199). *Sante Fe* clearly held that the alleged discrimination against the two white petitioners in that case, if proven, violated Title VII. Surely, even though this Court in *Sante Fe* expressly declined to consider the subject of affirmative action plans, this discrimination by the employer would not have been rendered any more legitimate if it had been visited upon a *larger* number of

white employees.[9] We submit that it is precisely the remedial purpose of the employer's action in *Weber* that allows the cases to be seen as consistent with one another.

The principal issue regarding such voluntary affirmative action plans in the Title VII context in our view is no longer whether they must be remedial of the employer's own discrimination, but what quantum and burden of proof will serve to make out a sufficient remedial purpose. As to quantum of proof, any rule must, on the one hand, be sensitive to an employer's understandable reluctance to concede guilt, opening him to liability for past discrimination against women or minorities, and on the other hand, the emasculation of the remedial predicate, turning it into a mere matter of statistical balance after all. Nor should the employer be encouraged to immunize himself against suit by minorities and women by affirmatively discriminating against other classes when doing so has no remedial justification. Cf. *Bushey* v. *New York State Civil Serv. Comm'n*, cert. denied, No. 84-336 (Jan. 7, 1985), slip op. 5 (Rehnquist, J., Burger, C.J., and White, J., dissenting from denial of certiorari). In our view, the plurality opinion in *Wygant*, slip op. 9, properly resolved this tension by requiring the employer to "have sufficient evidence to justify the conclusion that there has been prior discrimination," in other words, "that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."

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[9] Indeed, the employer in *Santa Fe*, "while conceding that 'across-the-board discrimination in favor of minorities could never be condoned consistent with Title VII,' contend[ed] nevertheless that 'such discrimination . . . in isolated cases which cannot reasonably be said to burden whites as a class unduly,' such as is alleged here, 'may be acceptable.'" The Court rejected this argument in emphatic terms: "There is no exception in the terms of the Act for isolated cases; on the contrary, 'Title VII tolerates *no* racial discrimination, subtle or otherwise.'" (427 U.S. at 280-281 n.8 (citation omitted), quoting *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973) (emphasis added)).

As to burden of proof, we agree with Judge Wallace that the affirmative action plan in a Title VII lawsuit brought by a non-minority employee should be viewed as an affirmative defense. It follows therefrom that the burden of persuasion, not merely the burden of going forward, is on the employer to show that his plan rested on a proper predicate of prior discrimination, and was narrowly tailored to address that problem. Moreover, the relevant statistical proof and historical information is, of course, most easily collected by the employer.[10]

C. No Affirmative Action Plan Is Permissible Which Is Not Narrowly Tailored To Protect The Interests Of Innocent Persons While Working To Remedy The Prior Discrimination

This Court's decisions also establish that an affirmative action plan must be narrowly tailored to achieve its remedial objectives while at the same time intruding to the least extent practicable upon the expectations and interests of innocent third parties. This rule, which certainly defines the outer limits of court-ordered remedies (*Sheet Metal Workers*, slip op. 50-51; *id.* at 8-9 (O'Connor, J., concurring in part and dissenting in part)), for reasons explained above in respect to the remedial basis for such plans, pages 13-17, *supra*, is no less appropriate as a limitation on voluntary affirmative action plans. Moreover, the requirement that state action affecting suspect classifications be narrowly framed to accomplish a compelling state purpose is a familiar principle of equal protection jurisprudence, which was applied in evaluating the affirmative action plan at issue by the plurality in *Wygant* (slip op. 11-12):

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[10] Thus, we continue to believe that the approach set forth in our brief in *Weber* (at 21-22) is correct:

> [B]y showing that a racial classification was used for selection, respondent [Weber] made a prima facie showing of a violation of Sections 703(g) and 703(d) of Title VII * * *. Our submission is that the complainant's prima facie case was rebutted, because * * * a race-conscious selection device is properly used here for remedial purposes—as a means of voluntarily eliminating the effects of prior exclusionary practices.

> Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose. *Fullilove*, 448 U.S., at 480 (opinion of Burger, C.J.). "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.*, at 537 (Stevens, J., dissenting).

We believe that the general approach set forth in our brief in *Weber* provides useful guidance. There we maintained (U.S. Br. at 21-22):

> Upon a finding of employment discrimination, a Court may order race-conscious relief * * *. Yet a race-conscious remedy is not lawful simply because a Court has imposed it: it is lawful because it is remedial and restores employment conditions, to the greatest extent possible, to what would have existed absent discrimination. As we shall show, Title VII does not prohibit employers or unions from voluntarily taking remedial measures that courts could order upon a finding of discrimination. Thus, where a particular program is appropriately tailored to remedy apparent employment discrimination and a Court could order the program as a remedy for proven employment discrimination, an employer is free to adopt the program voluntarily.[11]

It is thus necessary for a court reviewing a voluntary affirmative action plan to inquire not only as to the reasons why certain remedies were found necessary, but also to look closely to ensure that steps have been taken to avoid or minimize the discriminatory consequences of any relief necessary, and to focus it where serious prior discrimination calls for class-conscious relief. It should also examine the manner in which the plan actually operates, and the extent to which, in practice and in fact, it has an impact on innocent parties. It is quite possible, after all, for a plan to appear in one form on paper, but

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[11] This passage, of course, sums up the two-pronged approach the present brief urges in evaluating an affirmative action plan: that the plan be, first, remedial and, second, narrowly tailored to effect the remedy. It also stresses that the permissible boundaries of court ordered relief should act as a model for the limits on voluntary affirmative action. See discussion, *infra*, pages 20-23.

to have consequences in application which are very different.

Of particular importance is the degree and kind of impact on innocent persons. As Justice Powell noted in *Wygant*, slip op. 14, layoffs have a particularly crushing impact on identified individuals, and as we demonstrate below, pages 28-29, by the concrete circumstances of this case, class-conscious promotions may bear just as harshly on identified individuals. See also *Sheet Metal Workers*, slip op. 54 (stressing importance of avoiding harm to *existing* employees).

Further, in considering the closeness of fit between remedy and what is being remedied, it may turn out that only a particular geographic area or job progression within an employer's operations has suffered long-term effects of past discrimination. It may be a problem which, when focused on, can be fully addressed by changes in critical personnel or by affirmative action in the traditional sense of outreach and recruitment. Or it may be concluded that a different plan of specifically limited time duration will suffice to address the past discrimination.

In general, the court should examine the fit between the problem perceived and the means adopted to deal with it, and inquire whether other less offensive means exist to address the problem. See *Wygant*, slip op. 11 n.6 (citations omitted) (opinion of Powell, J.) (courts should look to see whether the "classification * * * 'fit[s]' with greater precision than any alternative means" and whether a " 'nonracial approach or a more narrowly tailored racial classification could promote the substantial interest about as well and at tolerable administrative expense' "); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977) (citation omitted) (" 'scope of remedy' " must fit " 'nature and extent' " of violation); *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972) ("if there are other, reasonable ways to achieve * * * [compelling state interests] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference"); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too

pernicious to permit any but the most exact connection between justification and classification.").

* * *

While we recognize that such an approach creates a tension for employers faced with the decision whether to embark on affirmative action, we believe that the tension is both manageable and useful. First, it ensures that the employer "act[s] with extraordinary care" (*Wygant*, slip op. 8 (plurality opinion)), the most minimal constraint required when dealing with racial or gender classifications. Such scrutiny by an employer, and if necessary, a court, will prevent the gratuitous or unnecessary use of racial preferences that are either needlessly overinclusive, casual social engineering, or the product of less noble motives such as the purely political desire to reward one's minority constituents or to insulate the employer from minority suits by discriminating against majority employees. See *Connecticut* v. *Teal*, 457 U.S. 440, 463-464 (1982) (Powell, J., dissenting). "Although voluntarily compliance is a laudable goal, members of this Court have recognized on other occasions that 'affirmative action' plans must be policed to prevent the practice of discrimination for discrimination's sake, see *Bakke*, *supra*, 438 U.S. at 307-310 (opinion of Justice Powell); cf. *Fullilove*, *supra*, 448 U.S. at 480 (opinion of the Chief Justice); and to protect the interests of innocent third parties, see *Weber*, *supra*, 443 U.S. at 208-209." *Bushey* v. *New York State Civil Serv. Comm'n*, cert. denied, No. 84-336 (Jan. 7, 1985), slip op. 5 (Rehnquist, J., dissenting from denial of certiorari). See also *Stotts*, 467 U.S. at 589 n.4 (O'Connor, J., concurring) (citations omitted) ("The policy favoring voluntary settlement does not, of course, countenance unlawful discrimination against existing employees or applicants."). "The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race" (*Fullilove*, 448 U.S. at 547 (Stevens, J., dissenting)). On the other hand, this careful inquiry still assumes that class-based affirmative action truly necessary to effectuate a remedial purpose will not be unduly impeded.

Moreover, any other approach would make largely illusory the requirement that adverse discriminatory consequences be kept to the minimum necessary to accomplish the remedial objective. One cannot know what is necessary as a remedy until one develops a concept of the wrong to be corrected. While mathematical precision may not be possible in such matters, it is possible generally to direct remedies at identified areas of discrimination, and to shape them in a way commensurate with the duration and pervasiveness of the discrimination.

This review not only ensures that the scope of the affirmative action does not exceed the nature and extent of the underlying violations, but also has the beneficial function of leading to permanent, meaningful reform in the employer's practices. The employer's process of determining the form and scope of its discrimination will act as a "spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' " *Weber*, 443 U.S. at 204 (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975)). In contrast, an employer that maintains, through discriminatory measures, the "appropriate" percentages of minority or female employees obviously has no incentive to engage in a searching examination of employment practices or identify those arbitrary barriers that act to exclude minority participation.[12]

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[12] *Firefighters* v. *Cleveland*, is not to the contrary. While the Court held that the relief provided in a consent decree need not conform to the limits on court-ordered relief imposed by Section 706(g), that was the only issue before it (slip op. 27). The Court thus did not limit the ways that nonminority plaintiffs may challenge the employer's actions under Section 703 or the Fourteenth Amendment. Indeed, it clearly stated that it was not deciding one of the critical issues in the present case—"what showing [an] employer would be required to make concerning prior discrimination on its part against minorities in order to defeat a challenge by nonminority employees based on § 703" (slip op. 14 n.8).

It would, after all, be rather surprising if an employee's rights under Title VII could be waived without his consent by his employer, unilaterally or in concert with other employees or litigants (see *Fire-*

Moreover, the rule that affirmative action programs must be directed at an employer's own discriminatory practices and demand his self-evaluation is an essential ingredient in striking a proper balance between the compensatory and nondiscrimination objectives of Title VII. The absence of discriminatory practices by a particular employer wholly negates the primary justification for permitting voluntary, class-based affirmative action programs, *i.e.*, a voluntary resolution of charges of discrimination. As this Court has noted, an employer's dual responsibilities of eliminating all "discrimination based on race" (*Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984)), and remedying past discrimination "are not always harmonious"; such competing interests are sometimes best resolved without hostile litigation if the employer "act[s] with extraordinary care" (*Wygant*, slip op. 8). Cf. *Weber*, 443 U.S. at 209-211 (Blackmun, J., concurring). If, however, there is an insufficient basis for concluding that discrimination has occurred—and thus no serious threat of litigation exists—there are no competing demands to reconcile and no need for any settlement of discrimination charges, voluntary or otherwise. The employer is not on the "tightrope" of seeking to resolve discrimination claims by minority employees without engendering such future claims by nonminority employees whose employment opportunities are infringed.

Accordingly, a rule that permits an employer to engage in class-based preferential treatment absent any tension

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fighters v. *Cleveland*, slip op. 1 (White, J., dissenting) ("An employer may not, without violating Title VII, simply decide for itself or in agreement with its employees to have a racially balanced work force and displace employees of any race to make room for employees of another race."); see also *W. R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 770-772 (1983); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) ("there can be no prospective waiver of an employee's rights under Title VII")). Title VII's principal aim is to end discrimination, not to end law suits, and the aim of voluntary compliance cannot override this more basic goal. Nor will settlements be encouraged by allowing the employer greater leeway in voluntary plans than a court has in ordering compliance: The *nonminority* employee will always be encouraged to bring the dispute into court if refusing to settle reduces the possibility of an adverse result for him.

engendered by past discrimination has the perverse result of authorizing an employer that has never engaged in discriminatory practices to now, for the first time, embark on such an invidious course. This creation of a new class of victims of discrimination, where none before existed, cannot even arguably be reconciled with the statutory objectives of Title VII. In such circumstances, it is evident that *any* "trameling" of the interests of nonminority employees is wholly "unnecessary." See *Weber*, 443 U.S. at 208.

D. The Decision Below Should Be Reversed Because Respondent Failed To Show That Its Plan Was Remedial Or Narrowly Tailored

Neither court below applied the proper framework to this case. Neither recognized the threshold importance of a showing by the employer that its plan was remedial; nor did they consider fully the relevant factors determining whether a plan is narrowly tailored. We believe the record is quite convincing that respondent's plan was not remedial, *and* that it was not narrowly tailored. Since there is not and hardly could be any dispute that petitioner was discriminated against, and because the burden was then on respondent to demonstrate that its plan was valid and it did not do so, reversal is appropriate. Nonetheless, given the fact that neither court applied the correct standard, and given the clarifications by this Court in the last term and any clarification the Court might propose now, the Court may wish to remand the case to allow respondent to develop and the courts below to evaluate the facts in accordance with the proper considerations.

1. While the district court stated that it did "not feel that * * * the plans were adopted to break down 'old patterns of segregation and hierarchy,'" and found as fact that respondent has not and does not discriminate against women, it also said that this holding was "not critical, because [the court's] decision is not based on a failure to carry that portion of [respondent's] burden" (Pet. App. 9a-10a, 13a). The court of appeals, on the other hand, found that, "[i]n order to demonstrate that its plan is remedial, an employer need not show its own

history of purposeful discrimination. It is sufficient for the employer to show a conspicuous imbalance in its work force" (*id.* at 26a (footnote and citation omitted)).

Neither court, therefore, gave serious consideration to this most important threshold inquiry regarding the plan's remedial nature. Indeed, in our view the record is convincing that the plan was not remedial. As discussed at pages 25-26, *infra*, the "statistical imbalance" asserted in this case is misleading and, even if an imbalance did exist, that simple fact alone would neither establish a prima facie case of sex discrimination against respondent, nor, taken in isolation, would it be sufficient to justify the use of a class conscious affirmative action plan. It is, of course, true that "[w]here gross statistical disparities can be shown, they may in a proper case constitute prima facie proof of a pattern or practice of discrimination," but a disparity depends on a comparison between the make-up of a particular segment of an employer's work force and the relevant qualified labor pool. *Hazelwood School District* v. *United States*, 433 U.S. 299, 307-308 (1977); *id.* at 347-348 (White, J., concurring); *Dothard* v. *Rawlinson*, 433 U.S. 321, 348-349 (1977) (White, J., dissenting). See also *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 584-587 (1979). In the court below there was no discussion of this or any other method of proving discrimination. There was no showing of the percentage of qualified females, nor, indeed, of what the relevant labor market was. See *Wygant*, slip op. 6 (plurality opinion); see also *id.* at 11 (opinion of O'Connor, J.); *Teamsters*, 431 U.S. at 339-340 n.20.[13]

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[13] Applicant data are especially important in the gender discrimination context. Due to a variety of reasons unrelated to discrimination, men and women simply do not apply for jobs in the same proportions. See England, *Explanations of Job Segregation and the Sex Gap in Pay* 54, 55; Berger, *Comparable Worth at Odds with American Realities* 65, 67-69; O'Neill, *An Argument Against Comparable Worth* 177, 181; and Polacheck, *Women in the Economy: Perspectives on Gender Inequality* 34, 46, 49-50, in U.S. Comm'n on Civil Rights, *Comparable Worth: Issue for the 80's* (1984). Cf. *Sheet Metal Workers*, slip op. 6 (O'Connor, J., concurring in part and dissenting in part) ("[I]t is completely unrealistic to assume that

More fundamentally, the affirmative action plan itself does not purport to be designed to redress past discrimination. Both the terms and the structure of the plan indicate that it is designed to manipulate the numerical balance of the workforce with respect to a variety of ethnic, racial, and physical (as well as gender) criteria, rather than to remedy any particular "statistical imbalance" which might have been indicative of discrimination. Thus, the Agency's December 1978 plan states as its first "Long-Range Employment Goal[]" "a work force whose composition in all job levels and major job classifications approximates the distribution of women, minority and handicapped persons in the Santa Clara County workforce" (J.A. 54, 120-121). The County October 1979 and the County and Agency 1982 plans repeat this objective in substance (J.A. 35, 120-121, 132-133; S.E.R. 170). In pursuit of proportional representation, the County established finely-tuned, comprehensive "long-range employment goals" for women and for five racial or ethnic groups based on their proportions in the area labor force.[14] In 1981, minor adjustments were made.[15] Yearly

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individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination. That, of course, is why there must be a substantial statistical disparity between the composition of an employer's work force and the relevant labor pool, or the general population, before an intent to discriminate may be inferred from such a disparity. *Teamsters* v. *United States*, 431 U.S. 324, 339-340, and n.20 (1977).").

[14] Women were to constitute 36.4% of the labor force, blacks 1.6%, Hispanics 14.8%, Asians 2.3%, American Indians .4%, and Filipinos .6% (J.A. 44-46). As the plurality noted in *Wygant*, the inclusion of so many groups in a plan illustrates its improperly undifferentiated nature (slip op. 15 n.13). We submit that it also casts doubt on the plan's remedial objective. Cf. *Fullilove*, 448 U.S. at 530 n.12 (Stewart, J., dissenting) ("In today's society, it constitutes far too gross an over-simplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Eskimo, and Aleut * * * currently suffers from the effects of past or present racial discrimination").

[15] The category for Filipinos was dropped; they may have been included in the "Hispanic" goal (S.E.R. 185). The goal for Asians was adjusted to 2.9% (although workforce data were unavailable),

preferential goals are established for any of these groups which are underrepresented based on a "Utilization Analysis" (see, *e.g.*, S.E.R. 186). That the plan's purpose hardly seems directed at remedying discrimination (or even at correcting gross statistical disparities) is reflected in the fact that, when the County embarked on the 1978 plan, "the overall representation in the Agency workforce of each minority group *approximated or exceeded* its ratio in the area work force" (J.A. 46-47 (emphasis added)). Moreover, the majority of these groups appear to have been overrepresented in *most* job categories, including several of the apparently most desirable.[16] By the time the 1982 plan continued the required long range goals and workforce analysis, the representation of these groups had apparently *increased*.[17] And as applied to women, the designation of jobs categories—including the category involved in this case, where the statistical disparity on the surface is asserted to be so striking—seems so arbitrary and susceptible to meaningless manipulation as hardly to serve as the basis for the discrimination it was supposed to justify.[18]

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and a new 6.5% goal was added for handicapped individuals (*id.* at 209).

[16] Of the seven job categories, blacks were apparently overrepresented in five, including professionals, technicians, and skilled craft workers; Hispanics were overrepresented in two and almost proportionately represented in two more; Asians were overrepresented in three, including professionals and technicians; American Indians were overrepresented in four, including officials and administrators and skilled craft workers; and Filipinos were overrepresented in five, including professionals, technicians, and skilled craft workers (S.E.R. 61).

[17] The 1982 plan (S.E.R. 209) indicates that blacks and American Indians had achieved parity or overrepresentation in *all* categories, Asians in all but one, and Hispanics in all but three.

[18] When compared to gross workforce statistics, women have been somewhat underrepresented in the workforce as a whole (approximately 22-23% versus 36.4% in the labor force), although they were overrepresented in the clerical and paraprofessional categories (J.A. 49, 53; S.E.R. 209). But even with respect to the promotion at issue, it is not clear that the preference remedies underrepresentation in any meaningful sense. The position here

If the case is remanded rather than simply reversed, respondent should be required to show "sufficient evidence to justify the conclusion that there has been prior discrimination" (*Wygant*, slip op. 9 (plurality opinion)) of sufficient severity to justify a program of affirmative, class-conscious relief benefiting non-victims.

2. Just as—indeed, *because*—there has been no discussion of prior discrimination, there has also been no adequate consideration of whether the affirmative action plan, as it actually operates, is a narrowly tailored response to that identified problem. Nonetheless, evidence in the current record regarding the apparent permanence of the plan and the fact that it trammeled promotions argue convincingly that the plan was not narrowly tailored.

As to the former, the court of appeals' assertion that, because the plan was not stamped permanent, the court could not conclude that it was permanent, is wholly unconvincing. Rather, given where the burden of proof lies and given that discrimination is to be the exception, not the rule, a plan with no ending mechanism should be presumed not to be temporary.[19]

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was classified as "skilled craft worker," a category in which women were underrepresented, but 33 of 34 similar "dispatcher positions" were classified as clerical (see 1 Tr. 7, 32-33; S.E.R. 202). Women constituted 77.9% of the office and clerical employees in 1981 and thus are overrepresented in that category (S.E.R. 209). Achievement of gender balance through such arbitrary classification can hardly be judged relevant to correcting discrimination.

[19] We note, moreover, that in this case respondent's promoting official testified that the plan *was* permanent. See Pet. App. 7a.

We also note that the plans established long range goals for agency workforce representation in all categories based on area labor force. A "utilization analysis" is conducted each year to determine whether there is underrepresentation; if there is, preferential short term hiring goals are employed (see generally J.A. 61). As we have seen (page 26, *supra*), the 1978 "utilization analysis" revealed that *every* racial and ethnic minority was proportionately represented or overrepresented in respondent's workforce (and in many job categories) prior to the adoption of each of the plans. Yet even as their representation has increased, annual utilization analyses based on the *long range goals* continues. While *short term* goals for preferential hiring or promotion are not employed in particular years when such a group is overrepresented, the

As to the fact that promotion was denied, we think that this also merits reversal. The preference in question (as well as many preferences under the plan) involves a promotion. As with layoffs, such preferences generally "impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption with their lives" (*Wygant*, slip op. 15 (opinion of Powell, J.)). A person who has invested his time and effort in a job and often has made great sacrifices with the hope and expectation of advancing in his job (particularly in the context of careers in public service where long service and regular advancement are the rule) has a far greater interest than an individual applying for an entry level position.[20] Eligibility for promotion is a major part of the "equity" in seniority built up by an employee. See *Wygant*, slip op. 14 (opinion of Powell, J.); Fallon & Weiler, *Conflicting Models of Racial Justice*, 1984 S. Ct. Rev. 1, 58, 67. See also *Franks*, 424 U.S. at 787 (opinion of Powell, J.) ("consideration for promo-

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"utilization analyses" conducted long after parity has been reached suggests that such goals will be used if any of these groups drops below proportional representation.

The 1982 plan also provides that "[p]rojections and goals will be clearly defined each year" for various groups (J.A. 141; S.E.R. 177). This process continues for each job category (*ibid.*), although two of these groups were proportionately or over-represented in all job categories (see S.E.R. 209). Additionally, even if the goals did end upon elimination of statistical imbalances, it is by no means clear that the plan would be "temporary." For example, as of October 31, 1981, six of 349 skilled craft workers were women and the goal is 36.4% or 127 (S.E.R. 209). Unfortunately, we know of no projections for the rate of replacement of these workers in the record. If, however, one were to assume that there would be 5% *all male* attrition rate per year (and neither creation of new jobs nor layoffs), even a 50% female quota would not enable respondent to meet its goal for almost fifteen years. Of course, if for whatever reason respondent does not have sufficient numbers of qualified female applicants to fill the jobs in those proportions, the plan would operate considerably longer.

[20] It should always be borne in mind, however, that under Title VII any employee has an expectation that he will not be penalized because of his race or gender.

tion" an element of competitive seniority).[21] Indeed, the facts of this case appear to illustrate the damage that a discriminatory denial of a promotion can do. Petitioner voluntarily requested a demotion to the maintenance department because he thought he would have a better chance of advancement to a more senior maintenance position, or to dispatcher (1 Tr. 127). The burden of the preferential promotion challenged in this case thus fell entirely on one person—a fifty-four year old employee with more than thirty years of experience who had taken a substantial career risk to pursue a promotion, and who had earned that promotion under respondent's merit criteria (*id.* at 125-129). The high price petitioner has had to pay in pursuit of gender balance cannot be diffused among anyone else.[22]

If the case is remanded rather than simply reversed, respondent should state precisely what it is that it is seeking to remedy, and explain why gender discrimination in favor of nonvictims, and not some less disfavored approach, is necessary to that end. We note that the district court did not discuss, other than in describing the events of this case, the ways in which the plan and its work force goals were involved in specific hiring and promotion decisions. A better understanding of the plan in its concrete operation would be relevant to whether there was indeed narrow tailoring here. Evidence should be received on the influence that the numerical objectives

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[21] The training program in *Weber*, conversely, did not even exist prior to the affirmative action plan (443 U.S. at 198).

[22] Nor, apparently, are white males the only persons who will suffer disadvantage under the plan. As we have seen, yearly hiring and promotion goals are employed to fill positions in job categories in which the various protected groups are underrepresented. But short-term goals are not required for groups which, at the same time, may be proportionately represented or overrepresented (see, *e.g.*, 2 Tr. 242-243). Thus—with respect to the job category at issue here, skilled craft workers, as of October 31, 1981—females could receive preference not only over male whites but over male Hispanics, blacks, Asians, and American Indians (all of whom were proportionately or overrepresented in this category (S.E.R. 209). Indeed, under the plan members of these groups may be both the bene-

actually had on hiring and promotion decisions. In this regard, the court of appeals' attempt to draw conclusions simply from the language of the written plan is completely inadequate (Pet. App. 28a-29a). Plans such as this one, and such as currently exist in the files of thousands of public and private employers across the country, may be interpreted and applied in ways which range from the wholly innocuous to the wholly impermissible.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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AUGUST 1986

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ficiaries and the victims of discrimination, depending on how the statistics jibe in specific years. See generally J.A. 61-65.

As we argued in *Wygant* (U.S. Br. at 19), different affirmative action plans often discriminate in favor of and against the very same minority groups. The statute in *Fullilove* gave a preference to all Spanish-speaking citizens (see 448 U.S. at 459); by contrast, the admissions program in *Bakke* favored only "Chicanos," *i.e.*, Mexican Americans, while all other Hispanics, including such groups as Puerto Ricans, Cubans, and Central Americans, were required to shoulder part of the burden of providing compensation (see 438 U.S. at 274). The instant plan is apparently another example of this phenomenon, since it could itself require discrimination for and against a particular group in alternate years, depending on the annual "utilization analyses."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20306